(11)

No. 98-678

IN THE

Supreme Court of the United States

LOS ANGELES POLICE DEPARTMENT,

Petitioner,

v.

UNITED REPORTING PUBLISHING CORP.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICI CURIAE OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN COURT AND COMMERCIAL NEWSPAPERS, INC., AMERICAN SOCIETY OF NEWSPAPER EDITORS, AND THE NATIONAL NEWSPAPER ASSOCIATION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

Journalists depend on the First Amendment, state open records acts and the federal Freedom of Information Act (FOI Act) to obtain information from and about government agencies. The media in turn provide the public with information that allows public participation in self-government. Journalists also depend on primary source materials contained in government

databases, such as address information, as an indispensable resource for investigative reporting. Many others, from scholars to community leaders to ordinary citizens, rely upon open records laws to gain access to information for myriad uses. In the case at hand, the government asserts that it may properly restrict access to address information contained in arrest records based on the requester's identity and intended use of the information. A ruling by this Court that accepts this argument would dangerously threaten the tradition of access embodied in the state and federal open records laws.

Amici believe that § 6254(f)(3) of the California Government Code is at odds with the majority of federal and state freedom of information laws. Further, the statute's language creates dangerous ambiguities with regard to the classification of records requesters. Not only does the statute threaten both the press' and public's traditional access to arrest records, but it also discriminates against commercial users of the information. Therefore, because of the threat posed by the statute to public records access, *amici* submit this brief in support of the Respondent, United Reporting Publishing Corporation.[1]

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of working reporters and editors, dedicated to defending the First Amendment and freedom of information interests of the news media and the public. The Reporters Committee has provided representation, legal guidance, and research in virtually every major press

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[1] Pursuant to Sup. Ct. R. 37.6, counsel for *amici* authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations other than *amici* made a monetary contribution to the preparation or submission of this brief. Written consent of all parties to the filing of the brief *amici curiae* has been filed with the Clerk pursuant to Sup. Ct. R. 37.3(a).

freedoms case that has been litigated in the United States since 1970. As a special project, the Reporters Committee sponsors the Freedom of Information Service Center, which daily advises reporters on issues of access to government records and proceedings.

The American Court & Commercial Newspapers (ACCN) was founded in 1930 to maintain the integrity of public notice and focuses on issues of concern to legal and business newspapers throughout the country. A member-driven non-profit trade association, ACCN is comprised of approximately 80 newspapers in cities throughout the United States. Newspapers belonging to ACCN are committed to reporting those facts and information essential to readers in their marketplaces and communities, frequently drawing on public records, including case filings, real estate transactions, court opinions, and other public information sources.

The American Society of Newspaper Editors is a nationwide, professional organization of more than 850 members who hold positions as directing editors of daily newspapers throughout the United States and Canada. The purposes of the Society, which was founded more than 75 years ago, include the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people. ASNE is committed to the proposition that, pursuant to the First Amendment, the press has an obligation to provide the citizenry of the country with complete and accurate reports of the affairs of government – be they executive, legislative, or judicial.

The National Newspaper Association, established in 1885, is a not-for-profit trade association representing the owners, publishers and editors of America's community newspapers.

NNA's mission is to protect, promote, and enhance America's community newspapers. Today, NNA's nearly 4,000 members make it the largest newspaper association in the United States. NNA works closely with policy officials to create a legal and regulatory environment conducive to the growth of community newspapers. NNA believes that the public's right of access to public information should be guaranteed and should not be restricted based on the intended use of the information.

STATEMENT OF THE CASE

Amici adopt the Respondent's Statement of the Case.

SUMMARY OF ARGUMENT

California's Public Records Act sets forth minimum standards for access to government records[2] and declares that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in the state." Cal. Gov't Code § 6250 (West 1999). However, the statute at issue, California Government Code § 6254(f)(3), conflicts with this provision by expressly barring the release of arrestee address information to requesters who seek to use the information for a commercial purpose.

In *United Reporting Publishing Corp. v. California Highway Patrol,* 146 F.3d 1133 (9th Cir. 1998), the Ninth Circuit declared the latter statutory provision to be an unconstitutional restriction on commercial speech. Applying this Court's four-part test to determine the constitutionality of government restrictions on commercial speech as laid down in

[2] A state or local agency may adopt requirements for itself which allow greater access to records than prescribed by the minimum standards set forth in the California Public Records Act. Cal. Gov't Code § 6253.1 (West 1999).

Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557 (1980) and its progeny, the appellate court determined that § 6254(f)(3) was unconstitutional because it failed to "directly and materially" advance the government's interest.

California has proffered a number of interests, including the protection of privacy, that it asserts justify this statute. In fact, not one of these asserted interests is directly and materially advanced by § 6254(f)(3). The statute is riddled with exceptions which undermine the purported interests which the law was enacted to protect.

The statute raises other substantial concerns as well. It bears little resemblance to many federal and state open records laws. Open records laws are not enacted for the benefit of specific users, but for the benefit of the public. The principle of broad accessability to public records – regardless of the identity of the requester, and regardless of intended use – is the norm and not the exception. California's statute draws distinctions based on the intended use of the information, favoring certain requesters, while barring others because they seek the information for a disfavored purpose. Such distinctions run contrary to this nation's tradition of access.

Even assuming *arguendo* that the identity of the requester is relevant, the California statute is so vague that it is impossible to determine who falls within the categories of acceptable users and who does not in any consistent manner. For example, journalists – both traditional and nontraditional – must interpret a statute which is riddled with ambiguity and backed by substantial penalties for noncompliance. In particular, ambiguous language renders it difficult to distinguish between the press and commercial users. When cautious requesters who are uncertain of their status choose not to request the information,

government oversight is diminished.

Although the ambiguity in § 6254(f)(3) stems from the California Legislature's failure to provide definitions for key terms, this Court should refrain from adopting definitions to clarify the statute. To do so would run contrary to previous holdings in *Lovell v. Griffin, Ga.*, 303 U.S. 444 (1938) and its progeny.

This Court should affirm the Ninth Circuit's ruling. This will reinforce the appellate court's correct application of the *Central Hudson* test, and also uphold and promote this nation's long tradition of access to public records and information.

ARGUMENT

I. RIGHTS OF ACCESS TO ARREST RECORDS BASED ON THE INTENT OR IDENTITY OF THE REQUESTER RUN CONTRARY TO THE OPEN RECORDS LAWS OF MANY STATES AND THE FEDERAL GOVERNMENT. SUCH DISTINCTIONS SHOULD NOT BE RELEVANT IN DETERMINING WHETHER ACCESS IS GRANTED.

Prior to July 1, 1996, California Government Code § 6254 provided that "state and local law enforcement agencies shall make public . . . the full name, current address, and occupation of every individual arrested by the agency." Cal. Gov't Code § 6254(f) (West 1995). This provision made arrestee addresses available to anyone for any purpose. The Legislature's 1995 amendment of the Public Records Act, allowed requesters to obtain the address of any arrested individual only after declaring under penalty of perjury that the request was made for a "scholarly, journalistic, political, or governmental purpose."

Cal. Gov't Code § 6254(f)(3) (1998).[3] Licensed private investigators also were permitted access for "investigative purposes." § 6254(f)(3). The revised statute expressly barred release to requesters seeking the information for commercial purposes. Moreover, requesters were prohibited from using address information "directly or indirectly" to sell a product or service. Although purporting to preserve the public's right to know, § 6254(f)(3) forecloses the access rights of certain requesters, thus silencing this speech. The only explanation for this is that the Legislature disliked the requesters' intended speech.

A. California looks to the federal FOI Act for guidance, but § 6254(f)(3) of the California Public Records Act bears no resemblance to the federal act's broad access provisions.

The California Public Records Act, as revised, radically departs from many other state and federal laws which make no

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[3] As amended, Cal. Gov't Code § 6254(f)(3) provides that:

> [S]tate and local law enforcement agencies shall make public the following information . . .
>
> (3) [T]he current address of every individual arrested by an agency and the current address of the victim of a crime, where the requester declares under penalty of perjury that the request was made for a scholarly, journalistic, political, or governmental purpose, or that the request is made for investigation purposes by a licensed private investigator . . . , except that the address of the victim of [certain specified crimes] shall remain confidential. Address information obtained pursuant to this paragraph shall not be used directly or indirectly to sell a product or service to any individual or group of individuals and the requester shall execute a declaration to that effect under penalty of perjury.

distinctions based on a requester's identity or intended use of government records. The federal Freedom of Information Act, to which California looks for guidance when construing the provisions of its Public Records Act, requires that requesters be treated uniformly with regard to rights of access.[4] The FOI Act dictates whether records are accessible to the public, and does not delineate which members of the public may have access.

Under federal law, "any person" may request records under the FOI Act. 5 U.S.C.A. § 552(a)(3) (West 1999). As defined in § 551(2) of the act, "any person" encompasses an "individual, association, or public or private organization other than an agency." Courts construing this provision have extended it to include a wide range of diverse parties. Observing that the language in 5 U.S.C.A. § 551 on its face did not restrict rights under the FOI Act solely to United States citizens, this Court and others have noted that Congress intended to provide broad access to the public at large, and not limit access solely to certain designated members of the public. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *Doherty v. Department of Justice*, 596 F. Supp. 423, 426 (S.D.N.Y. 1984), *aff'd*, 775 F.2d 49 (2nd Cir. 1985); *O'Rourke v. Department of Justice*, 684 F. Supp. 716, 718 (D.D.C. 1988). The only apparent exception to this broad grant of access is a judicially implemented bar preventing fugitives from justice from "call[ing] on the resources of the court to adjudicate" a claim under the FOI Act. *Doyle v. Department of Justice*, 494 F.

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[4] The California Supreme Court has stated that "the judicial construction and legislative history of the federal act serve to illuminate" the interpretation of its California counterpart. *American Civil Liberties Union of Northern California, Inc. v. Deukmejian*, 32 Cal. 3d 440, 447 (Cal. 1982); *see also Black Panther Party v. Kehoe*, 42 Cal. App. 3d 645 (Cal. Ct. App. 1974).

Supp. 842, 843 (D.D.C. 1980), *aff'd*, 668 F.2d 1365, 1365-66 (D.C. Cir. 1981)(refusal to entertain claim unrelated to FOI Act provisions), *cert. denied*, 455 U.S. 1022 (1982).

Furthermore, under the FOI Act, requests can be made for any reason whatsoever. No showing of "relevancy" is required. *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771 (1989). This Court has held that a FOI Act requester's basic rights of access "are neither increased nor decreased" by virtue of having a greater interest in the records than that of an average member of the general public. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 143, n. 10. Moreover, requesters need not explain or justify their requests, because the purpose for which records are sought "has no bearing" upon the merits of the request. *Id.*[5]

With specific exception for "first party" requesters,[6] a requester's identity or intended use of the information does not affect the determination of whether the information requested is released under the FOI Act. The relevance of identity or

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[5] *See also North v. Walsh*, 881 F.2d 1088, 1096 (D.C. Cir. 1989)(rejecting requester's identity and intended use as factors for determining access rights under the FOI Act); *Durns v. Bureau of Prisons*, 804 F.2d 701, 706 (D.C. Cir. 1986), *cert. granted, judgment vacated on other grounds & remanded*, 486 U.S. 1029 (1988); *Forsham v. Califano*, 587 F.2d 1128, 1134 (D.C. Cir. 1978).

[6] However, this Court has observed that a requester's identity can be significant with regard to the application of a privilege under Exemption 5. It noted that "there is good reason to differentiate between a governmental claim of privilege for presentence reports when a third party is making the request and such a claim when the request is made by the subject of the report." *United States Dep't of Justice v. Julian*, 486 U.S. 1, 14 (1988); *accord Reporters Comm.*, 489 U.S. at 771 (recognizing single exception to FOI Act-disclosure rule in case of "first party" requester).

intended use is limited to procedural issues such as expedited access or fee calculation. Unlike the California statute, the FOI Act allows commercial users to request government information on exactly the same terms as any other requester, although such requests are subject to a separate fee structure from that assessed for requests from educational or noncommercial scientific institutions or representatives of the news media.[7] In short, neither a requester's identity nor purpose substantially affect *access* rights under the FOI Act.

B. Section 6254(f)(3) also radically departs from the majority of state open records laws.

As Congress did with the federal FOI Act, many state legislatures also have adopted or expressed, as a matter of policy, the proposition that broad access to records is an essential component of participatory democracy.[8] At least seven states have enshrined a right of access in their state constitu-

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[7] 5 U.S.C. § 552(a)(4)(A)(ii). The designation of a requester as a commercial user under the FOI Act turns on the use to which the information will be put, rather than on the identity of the requester. *See* 28 C.F.R. § 16.11 (1998) (defining commercial use as "a use or purpose that furthers [the requester's] commercial, trade, or profit interests.").

[8] Delaware's Freedom of Information Act declares that "it is vital that citizens have easy access to public records in order that the society remain free and democratic." Del. Code Ann. tit. 29, §10001 (Michie 1997). Illinois declares that the right to inspect public records "is necessary to enable the people to fulfill their duties of discussing public issues fully and freely." Ill. Comp. Stat. ch. 140/1 § 1 (1998). *See also* Mich. Comp. Laws § 15.231 (1997), N.H. Rev. Stat. Ann. § 91-A:1 (1990), N.Y. Pub. Off. Law § 84 (West 1998), Or. Rev. Stat. § 192.001(1)(b) (1999), Va. Code § 2.1-340.1 (1999), Wis. Stat. § 19.31 (1999), and Vt. Stat. Ann. tit. 1, § 316(a) (1997).

tions.[9]

Many states do not distinguish between requesters' rights of access based on identity or interest.[10]

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[9] Four do so explicitly. They are Louisiana, Montana, New Hampshire, and North Dakota. *See* La. CONST. art. XII, § 3, Mont. CONST. art. II, § 9, N.H. CONST. pt. 1. art. 8, and N.D. CONST. art. XI, § 6. The Tennessee Legislature's source of authority to enact an open meetings law derives from its state constitution, which provides: "That the printing presses shall be free to every person to examine the proceedings of the legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof." Tenn. CONST. art. 1, § 19. Utah law states that the legislative intent behind its records law creates a constitutional right of access. The Government Records Access and Management Act expressly recognizes "two constitutional rights: (a) the public's right of access to information concerning the conduct of the public's business; and (b) the right to privacy in relation to personal data gathered by governmental entities." Utah Code Ann. § 63-2-102(1)(Michie 1993). Vermont recognizes a constitutional right of access to government meetings only. Vt. CONST. art. 6.

[10] For example, in Iowa, the open records act does not limit access based on the purpose of the request. Iowa Code § 22.2(1)(1998). North Carolina and Oregon provide that "no person . . . shall be required to disclose the purpose or motive for the request." N.C. Gen. Stat. § 132-6(b)(1997) and Or. Att'y Gen. PUB. RECORDS AND MEETINGS MANUAL, § 1(A) (1995).

Courts in several jurisdictions have made similar findings. The Michigan Supreme Court has ruled that the state's public records act does not require a person to justify requests for access. *See State Employees Ass'n v. Dep't of Management and Budget*, 404 N.W.2d 606 (Mich. 1987). In New Hampshire, the state supreme court held that "every citizen" is entitled to access to public records and that a right to the information is not dependent on a demonstration of need. *Mans v. Lebanon School Board*, 290 A.2d 866, 867 (N.H. 1972). *See also Walsh v. Barnes*, 541 So.2d 33, 35 (Ala. Civ. App. 1989); *Dunhill v. Director, District of Columbia Dept. of*

(continued...)

The same tradition of access to arrest records exists in most states. A minority of states have chosen to deny commercial users access to arrest records. They are Arizona, California, Florida, Georgia, Maryland, New York, New Mexico, Rhode Island, and Texas.[11] However, of those state statutes that have been challenged, only Colorado's statute has survived constitutional scrutiny.[12] *See Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508 (10th Cir. 1994), *cert. denied*, 513 U.S. 1044 (1994).

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[10](...continued)
Trans., 416 A.2d 244, 246-47 (D.C. 1980), *Techniscan v. Passaic Valley Water Comm'n*, 527 A.2d 490, 492 (N.J. App. Div.1987), *MacEwan v. Holm*, 359 P.2d 413, 418 (Or. 1961), *Ryan v. Pa. High er Educ. Assistance*, 448 A.2d 669, 670 (Pa. Commw. Ct. 1982).

[11] *See* Ariz. Rev. Stat. § 28-667 (West 1998); Cal. Gov't Code § 6254(f)(3)(West 1999); Fla. Stat. chs. 119.105, 316.650 (1998), Ga. Code Ann. §§ 33-24-53, 35-1-9 (Michie 1998); Md. Code Ann., State Gov't § 10-616 (1999); N.M. Stat. Ann. § 14-2A-1 (Michie 1998); N.Y. Pub. Off. Law § 89 (West 1998), R.I. Gen. Laws § 38-2-6 (1997) and Texas Bus. & Com. Code Ann. § 35.54 (1998).

[12] *See* Cal. Gov't Code § 6254 (Deering 1997), invalidated by *United Reporting Publishing Corp. v. California Hgwy. Patrol*, 146 F.3d 1133 (9th Cir. 1998), *aff'g* 946 F. Supp. 822 (S.D. Cal. 1996); Fla. Stat. ch. 316.650 (1998), ch. 316.650(11) invalidated by *Babkes v. Satz*, 944 F. Supp. 909 (S.D. Fla. 1996); Ga. Code Ann. §§ 33-24-53, 35-1-9 (Michie 1998), § 33-24-53(c) invalidated by *Statewide Detective Agency v. Miller*, No. 96-Civ.1033 (WBH), Order (N.D. Ga. Aug. 12, 1998); § 35-1-9 invalidated by *Speer v. Miller*, 15 F.3d 1007 (11th Cir. 1994), *on remand*, 864 F. Supp. 1294 (N.D. Ga. 1994); N.M. Stat. Ann. § 14-2A-1 (Michie 1998), invalidated by *Lavalle v. Udall*, Civ. A. No. 94-0404-M, Order, (D.N.M. Feb. 16, 1996); and Tex. Bus. & Com. Code Ann. § 35.54 (West 1998), invalidated by *Innovative Database Sys. v. Morales*, 990 F.2d 217 (5th Cir. 1993). The Arizona, Maryland, New York, and Rhode Island statutes have not yet been challenged.

In *Lanphere*, the Tenth Circuit upheld a Colorado statute prohibiting access to criminal justice records by those who intended to use them for commercial purposes, finding that the statute did not unconstitutionally restrict commercial speech. Even so, the Tenth Circuit's decision was criticized by dissenting Judge Aldisert, who wrote:

> [T]he issue is not whether Colorado is obliged to provide a client base to [a law firm] or required to furnish a source of news to El Paso County News. Rather, the question is to what extent may it deny public access, irrespective of the motivation for access, so long as the motivation is not for an unlawful purpose. In my view, a desire for pecuniary gain in the world's strongest capitalist society operating under a democratic political system has not yet been declared unlawful, offensive, or unconstitutional."

Id. at 1519-20 (Aldisert, J. dissenting).

Although a handful of states deny commercial users access to arrest records, the remainder do not. More typical are the regulations of the Massachusetts' Public Records Supervisor, which prohibit a records custodian from inquiring into why a requester seeks access and which provide that the access to government records for commercial purposes is perfectly proper. *See* Mass. Regs. Code tit. 950 §§ 32:05(1),(5)(1997). Similarly, North Carolina and Oregon laws require arrestee address records to be disclosed. *See* Or. Rev. Stat. § 192.501 (1998) and N.C. Gen. Stat. § 132-1.4(c)(2) (1997). Neither state bars access for commercial users of those records. Some states charge commercial users higher fees that "reasonably reflect" the cost of supplying the records, thus addressing the cost concerns that underlie the drafting of § 6254(f)(3). *See* Minn. Stat. Ann. § 13.03(3) (1999)(reasonable fees for information

with commercial value may reflect development costs); Minn. Stat. Ann. § 13.82(2)(j) (West 1999); Okla. Stat. Ann. tit. 51 24-A.5(3), 24-A.8(A)(1)(1998).

Some laws do not explicitly indicate whether access to arrestee address information for commercial purposes is permitted. Some, like Indiana's, state that designated lists of names and addresses "may not be disclosed by public agencies to commercial entities for commercial purposes." Indiana Code § 5-14-3-4 (Burns 1997). However, arrestee address information is not among the categories whose disclosure is barred. *Id. See also* Ark. Code Ann. § 25-19-105 *et seq.* (Michie 1998), Ohio Rev. Code tit. 1, § 149.43(B),(E) (1998).

California's statute is clearly in the minority, demonstrating that the state's decision to bar access to arrest records for certain purposes is an anomaly.

II. UNDER THE REVISED STATUTE, IT IS DIFFICULT TO DETERMINE WHO FALLS WITHIN THE CATEGORIES OF ACCEPTABLE USERS AND WHO DOES NOT.

Section 6254(f)(3), as amended, permits access to arrestee information for "scholarly, journalistic, political, or governmental purposes," but fails to define those terms. It also fails to define what constitutes "indirectly" selling a product or service. These ambiguities raise significant questions of statutory interpretation and pose a threat to access on two points.

First, it is unclear whether records custodians will recognize that a nontraditional requester – who may not be as immediately identifiable as a beat reporter from a local newspaper or television station – is motivated by a "journalistic" purpose. Records custodians and law enforcement officials, without guidelines to clearly demarcate the boundaries of the "proper"

purposes set forth in the statute, could easily discriminate against requesters based on their subjective assessment of the requester's purpose. As surveys of records law compliance have repeatedly indicated, government officials can, and do, deny requesters records that are clearly public.[13] Asking records custodians to apply unclear laws can only make a bad situation worse.

Second, and perhaps more importantly, in the absence of guidance, requesters are left to determine for themselves whether their purpose is permissible. For many requesters, this will be intimidating, because a wrong guess renders them vulnerable to criminal sanctions. Given the substantial penalties that accompany violations of the act, cautious requesters who are uncertain of their status will choose not to request the information at all, thus depriving themselves, and ultimately, the public, of this important information.

Section 6254(f)(3) requires requesters to declare under penalty of perjury that they are seeking records for a permissible use. However, the use to which the records will be put may not always be clear at the time of the request. Requesters who may not fall clearly into one category or another must surmise whether the statute will be held to apply to them. Those unwilling or unable to satisfy themselves that the statute will protect them will be tempted to forego access to the records,

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[13] *See generally* Susan Brown, *Police Frequently Hinder Access to Public Records*, Indianapolis Star, Jan. 31, 1999, at 1.; Ross Cheit, et al., *Open or Shut? Access to Public Information in Rhode Island's Cities and Towns*, Brown University, April 28, 1999; Geoff Dutton, *Government in the Sunshine*, Daytona Beach Sunday News-Journal, Jan. 17, 1999, at 1A.

rather than risk prosecution for perjury.[14]

A. The statute provides little guidance for distinguishing between the press and commercial users.

With the rise of nontraditional journalistic outlets such as the Internet, it is increasingly difficult for a requester or records custodian to determine whether the contemplated use of the records constitutes a "journalistic purpose" under the statute. In both theory and practice, it is unclear whether the Legislature intends the term to apply only to the traditional press, or if the term encompasses nontraditional media as well.[15]

In cases where the requester and the end user of arrestee address information are not the same entity, the line between permissible and impermissible use blurs further. The transfer of information from the government to end users can often involve many interim parties. For example, journalists frequently rely on information brokers as sources for information that is too time-consuming to gather or requires research skills which they lack. Information services also can analyze and digest large quantities of government data, often revealing trends or patterns that may not be visible in a mass of raw data. These brokers

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[14] Under the California Penal Code, perjury is punishable by imprisonment in a state prison for two, three or four years and by fines. Cal. Penal Code §§ 126, 672 (West 1999). Furthermore, under California's perjury law, the requester is admonished that "an unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false." Cal. Penal Code § 125 (West 1999).

[15] It is also unclear whether the statute prohibits members of the creative community, such as film scriptwriters or authors of fiction, from obtaining arrestee address records for purposes such as contacting suspects to gather anecdotal information or other background to develop fictional works.

typically are engaged in for-profit activity. As enacted, § 6254(f)(3) makes no provision whatever for situations where a commercial information broker is acting at the behest of a newspaper or scholar. The commercial broker must guess whether it may obtain such records legally by effectively adopting its client's intent as its own, or whether it is barred from seeking the information because it does so as part of a for-profit transaction.

The statute also fails to account for the fact that requester may wish to make multiple uses of the information. For example, it is permissible for a scholar or journalist to seek arrestee address information in order to conduct research on areas where suspects live, and publish the information wholesale. A separate party may then make commercial use of the scholar's published information, apparently without triggering the punitive provisions of the statute. Yet, a single requester could not seek to use the information for both commercial and noncommercial uses without running afoul of § 6254(f)(3).

Although not expressly recognized by the court below, *amici* contend that United Reporting Publishing Corporation engages in noncommercial speech.[16] Using arrestee address

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[16] The Ninth Circuit has recognized that mixed-speech/commercial activities can implicate the First Amendment. In *Gaudiya Vaishnava Society*, the Ninth Circuit held that where the sale of merchandise bearing political, religious, philosophical, or ideological messages "is inextricably intertwined," with other forms of protected expression (like distributing literature and proselytizing) "the entirety must be classified as noncommercial and we must apply the test for fully protected speech." *Gaudiya Vaishnava Soc'y v. San Francisco*, 952 F.2d 1059, 1064 (9th Cir. 1990), *cert. denied*, 504 U.S. 914 (1992). *See also One World One Family Now v. Honolulu*, 76 F.3d 1009 (9th Cir. 1996)(restriction upheld on different grounds)(Pregerson, J. dissenting), *cert. denied*, 117 S.Ct. 554 (continued...)

records, Respondent publishes its newsletter, the *JAILMAIL Register*. It then distributes the newsletter to both its clients and arrestees. Respondent's clients use the information for many purposes, including sending free literature to arrestees offering such services as legal consultation and substance abuse counseling. The *JAILMAIL Register* also includes articles on these same topics. If § 6254(f)(3) is upheld, United Reporting Publishing Corporation will be barred from obtaining information even though it is being used for a permissible purpose, as well as one that could be classified as commercial.

B. This Court traditionally has been reluctant to define "press." Any decision interpreting the statute's classification of requesters should broadly interpret what constitutes a "journalistic purpose."

If this Court chooses to address the ambiguities in the statute, it should be mindful of its previous interpretations of "the press." Historically, this Court has been reluctant to define who is and who is not "the press."

Sixty-one years ago, this Court noted in *Lovell v. Griffin, Ga.*, that "the liberty of the press is not confined to newspapers and periodicals," noting that "it necessarily embraces" such formats as pamphlets and leaflets. 303 U.S. 444, 452 (1938). In striking down an ordinance banning the distribution of "circulars, handbooks, advertising, or literature of any kind" as facially unconstitutional, Chief Justice Hughes stated that "the press in its [historic] connotation comprehends every sort of publication which affords a vehicle of information and

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[16](...continued)
(1996). Despite these decisions, the courts below decided the issue on commercial speech grounds and not under a higher level of scrutiny.

opinion." *Id.* at 452. Similarly, in *Mills v. Alabama*, Justice Black wrote that "the Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars, to play an important role in the discussion of public affairs." 384 U.S. 214, 219 (1966). This broad construction was further developed in dicta in *Branzburg v. Hayes,* noting the existence of an "informative function" by the press. 408 U.S. 665, 703-04 (1972). Writing for the Court, Justice White noted that:

> [L]iberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods. Freedom of the press is a "fundamental personal right" which "is not confined to newspapers and periodicals . . . . The informative function asserted by representatives of the organized press in the present case is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists."

Branzburg, 408 U.S. at 703-705 (internal citation omitted).[17]

Justice White again recognized the "informative function" language in *Herbert v. Lando,* noting that the press and broadcast media have played "a dominant and essential role" in serving that end. 441 U.S. 153, 189 (1979). *See also Dun & Bradstreet, Inc. v. Greenmoss Builders*, Inc., 472 U.S. 749, 767 n. 4 (1985)(White, J. concurring). Similarly, in his concurrence in *First National Bank of Boston v. Bellotti*, Chief Justice

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[17] In its footnote for the preceding paragraph, the Court warned that "by affording a privilege to some organs of communication but not to others, courts would inevitably be discriminating on the basis of content." *Branzburg*, 408 U.S. at 705, n. 40.

Burger noted the Court's broad approach to the scope of Press Clause protection, and citing *Branzburg* and *Lovell*, observed that the "informative function" is performed by more than just the "traditional" media. 435 U.S. 765, 801-02 (1978) (Burger, C.J., concurring). Lower courts have also followed suit.[18]

In the context of fee waivers and other benefits, the federal FOI Act also reflects this Court's focus on whether the party in question performs an informative function. The statute provides that a "representative of the news media" is part of a category of requesters entitled to certain automatic fee benefits,[19] and the term refers to any person actively gathering information of current interest to the public for an entity that is organized and operated to publish or broadcast news to the general public.[20] At least one federal circuit court has extended this definition, holding that a private research archive is a "representative of the news media" within the meaning of the statute because its intent to gather, edit, and disseminate the information to the

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[18] In those cases where the federal circuits have defined "press" for such purposes as determining to whom journalists' privileges apply under state shield law, they have followed this Court's lead. In *von Bulow v. von Bulow*, the Second Circuit Court of Appeals held that in order to invoke the journalist's shield laws, the person seeking to invoke the privilege must intend to use material – sought, gathered, or received – to disseminate information to the public and such intent must exist at the inception of the newsgathering process. 811 F.2d 136 (2nd Cir. 1987), *cert. denied*, 481 U.S. 1015 (1987). *Von Bulow* was later adopted by the Ninth Circuit in *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993). Considering a similar issue, the Ninth Circuit adopted the Second Circuit's language and stated that "the critical question . . . is whether [the journalist] is gathering news for dissemination to the public." *Id.* at 1293.

[19] 5 U.S.C.A. § 552(a)(4)(ii)(II).

[20] *See* 28 C.F.R. § 16.11 (b)(6) (1998).

public was akin to that of the other news media sources. *National Sec. Archive v. United States Dept. of Defense*, 880 F.2d 1381 (D.C. Cir. 1989), *reh'g en banc denied*, No. 88-5217 (D.C. Cir. Sept. 26, 1989), *cert. denied*, 494 U.S. 1029 (1990). In other words, like this Court, the D.C. Circuit looked to purpose, rather than affiliation, in deciding whether to uphold the grant of the fee benefit.

If this Court elects to define or clarify § 6254(f)(3)'s "scholarly, journalistic, political, or governmental purposes," it should do so broadly, with an eye toward providing maximum access, mindful of the broad construction it has given to definitions of "the press."

III. THE STATUTE FAILS TO SATISFY *CENTRAL HUDSON* BECAUSE THE STATE'S ASSERTED INTEREST OF PROTECTING PRIVACY IS NOT DIRECTLY AND MATERIALLY ADVANCED BY § 6254(f)(3).

The California Legislature enacted § 6254(f)(3) for two express purposes: to reduce the expense borne by law enforcement agencies in responding to requests, and to protect the privacy of California citizens.[21] However, the district court found that the statute did not advance the state's interest in protecting the privacy of its residents, because it permitted

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[21] The district court noted the statute's legislative history. To wit:

> From a law enforcement perspective, the processing of requests puts a tremendous strain on already scarcely allocated time and resources. From a consumer perspective, this is an invasion of privacy. While these records are justifiably public in many ways, the unsolicited direct mail advertisements are unwarranted.

Legislative History (June 4, 1996 letter), p.4., *quoted in United Reporting Publishing Corp. v. Lungren*, 946 F. Supp. 822, 826 (S.D. Cal.) (1996).

"much more persuasive invasions of privacy" such as allowing the information to be published in a newspaper or to be obtained by the arrestee's personal enemies or employers. *United Reporting Publishing Corp.*, 946 F.Supp. 822, at 827-828.

On appeal, the government has revamped its asserted interests, limiting it to protecting the privacy of arrestees and victims and preventing the creation of "unreliable criminal history information banks." The Ninth Circuit rejected both of these contentions, holding that the many exceptions to the statute undermined the statute's stated intent to protect privacy and rendered it unconstitutional. *United Reporting Publishing Corp. v. Lungren*, 146 F.3d 1133, 1140 (9th Cir. 1998). It also found that the state presented no evidence that unreliable criminal information banks would be created. It concluded that the asserted harm was "no more than speculation and conjecture and was insufficient to sustain a commercial speech restriction." *Id.* at 1138-39.

Petitioner argues before the Court that the California statute advances the state's interest in protecting the privacy of arrestees and victims "by eliminating the greatest potential for dissemination of their home addresses." Pet. Brief at 31. Further, it claims that the statute reduces the level of solicitation of arrestees and prevents employers and other commercial entities from using the arrestees' status against them. *Id.* at 32. Finally, it claims a dual interest in both protecting privacy and keeping the public informed. None of these interests is advanced by the statute.

A. Section 6254(f)(3) fails to directly and materially advance the state's asserted interests in protecting privacy.

Assuming for the sake of argument that Respondent is

engaged in commercial speech, § 6254(f)(3) cannot satisfy this Court's *Central Hudson* requirements.[22] This litigation has focused on the third of the four factors set forth in *Central Hudson*, which requires any restriction on commercial speech to directly and materially advance the asserted governmental interest.[23] This Court has held that a statute cannot materially advance the government's interest when exceptions to the regulation serve to undermine that interest. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995). *See also Greater New Orleans Broadcasting Assoc. v. United States*, ___ U.S. ___, No. 98-387 (June 14, 1999).

Even if the state had a substantial interest in protecting an arrestee's privacy right in his address information, the statute does not directly and materially advance this interest.[24] The

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[22] As this Court cautioned in *44 Liquormart*, the need to show that a regulation will advance a substantial interest "directly" and to "a material degree" is particularly compelling where the "drastic nature of its chosen means" is the "wholesale suppression of truthful, nonmisleading information." *44 Liquormart, Inc. v. Rhode Island*, 134 L.Ed.2d 711, 728 (1996).

[23] The test set forth in *Central Hudson* requires that:

> [1] At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. [2] Next we ask whether the asserted government interest is substantial. [3] If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest. *Central Hudson*, 447 U.S. at 566.

[24] It is unclear whether a constitutional right to privacy extends to address records. In a case soon to be before this Court, the Fourth Circuit (continued...)

many exceptions to the statute are fatal to the state's asserted interests because they provide for the widespread dissemination of information that the state otherwise seeks to restrict. Petitioner argues that the statute advances the state's interest in protecting the privacy of arrestees and victims "by eliminating the greatest potential for dissemination of their home addresses." Pet. Brief at 31. In fact, the statute allows a wide range of requesters to disseminate arrestee address information. Address information may be published in every newspaper and broadcast across the state by television and radio stations. Scholars are free to publish address information in scholarly journals. Political figures and government agencies may contact arrestees or publish the information on the Internet where it may be seen worldwide. Licensed private investigators, perhaps hired by intimates of the arrestee, potential employers or a neighborhood watch, may freely seek and disseminate address information. In short, the statute allows for the dissemination of the information to almost every conceivable sphere of the arrestee's life, including the arrestee's family, home, and

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[24](...continued)
Court of Appeals stated no constitutional right of privacy exists with respect to information contained in driver's licensing and automobile registration records – including addresses. *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1999), *certiorari granted, Reno v. Condon*, No. 98-1464, May 17, 1999. Although the *Condon* panel invalidated the Driver's Privacy Protection Act on federalism grounds, the majority expressly stated that neither the Supreme Court nor any federal appellate court has ever found that there is a right to privacy in the information contained in driver's records.

The *Condon* court was persuaded that "the same type of information is available from numerous sources. 'As a result, an individual does not have a reasonable expectation that the information is confidential.'" *Condon*, 155 F.3d at 464-65. "In sum, the information found in motor vehicle records is not the sort of information to which individuals have a reasonable expectation of privacy." *Id.*

workplace. It is hard to see how Petitioner can base its restrictions on access on the claim that "total public disclosure" will follow from Respondent's publication, when existing exceptions to the statute allow the same result.

Petitioner also asserts that the statute discourages solicitation of arrestees and victims, thereby preventing them from feeling a sense of personal violation arising from knowledge that address information about them is on commercial mailing lists.[25] Pet. Brief at 31. But Petitioner is confusing access with subsequent conduct. As the Petitioner notes, commercial publishing services are free to use alternative means of gathering the same information to achieve the same result it alleges the statute prevents. Commercial publishers may freely search newspapers or the airwaves to compile the same information. They may also comb the Internet or scholarly publications. In the end, the statute does not prevent commercial mailing list services from using arrestee address records. It simply makes gathering the information more cumbersome.

Arguments that the statute will prevent employers and other commercial entities from using the information against arrestees are equally specious. Petitioner asserts that § 6254(f)(3) serves the state's interest in protecting arrestees from discrimination. Pet. Brief at 32. However, the statute allows employers to retrieve the same information from the press, the

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[25] Petitioner misinterprets the nature of the arrestee's privacy interest. The invasion of privacy occurs upon the uncovering of the information and not upon the receipt of further information generated as a result of the invasion. *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 476 (1978). A statute barring the dissemination of information for some uses while allowing its release for others simply cannot serve a privacy interest.

Internet, or a private investigator.[26]

B. Petitioner has failed to recognize the value of Respondent's communication.

Finally, Petitioner claims that the statute serves the dual purpose of both protecting privacy and keeping the public informed. As the courts below have noted, the statute does not advance this purpose because it allows the release of the information in many different ways. Petitioner's assertion accords no worth to United Reporting Publishing's communication, erroneously assuming that commercial publishing services and newsletters play no role in informing the public. Those who have received this information from Respondent and its colleagues are testimony to the contrary.

As noted *supra*, pamphlets and newsletters have long played an important role in providing important news and information to the public. These publications have also been afforded First Amendment protection under the Press Clause. Because they often target a specific audience, newsletters and pamphlets are a highly effective means of communicating timely information to an audience. These publications often report on areas of specific public concern in a more in-depth manner than other mass media. Such publications may even accomplish the goal of informing the public more effectively than other "traditional" media outlets such as daily newspapers or radio and television broadcasts which may not report the information in as detailed a manner. If § 6254(f)(3) is upheld, the public will be left to rely on other, less-specialized media outlets to obtain arrestee information, and the public's need for

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[26] Petitioner apparently assumes, contrary to the presumption of innocence afforded by our Constitution, that a presumption of guilt attaches upon arrest.

information may go unmet.

IV. THE STATUTE UNDERCUTS THE SUBSTANTIAL PUBLIC BENEFIT PROVIDED BY OPEN RECORDS AND ALLOWS FOR ARBITRARY GOVERNMENT DISCRIMINATION AGAINST REQUESTERS.

Journalists have long used open records laws to reveal information about law enforcement activities. A 1999 Pulitzer-prize winning *Washington Post* series examining disproportionately high numbers of shootings by the city's police officers prompted the U.S. Department of Justice to review dozens of fatal shootings by city police, and spurred the police department to dramatically improve training requirements. The series made extensive use of such sources as police records, FBI homicide records, and records of firearm discharges by D.C. officers.[27]

Following the alleged rape of a visiting businesswoman by an airport shuttle van driver, the *Boston Globe* obtained information about two previous arrests on the suspect's record from the state's public safety office. When the *Globe* confronted the suspect's employer, it admitted it had not checked the suspect's arrest record, claiming it did not believe it had the right to gain access to the records. The shuttle company then promised to change its policy and check the criminal backgrounds of all its drivers in the future.[28] Several years earlier,

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[27] *See* Jo Craven et al. *Deadly Force: An Investigation of D.C. Police Shootings*, Washington Post, Nov. 15-19, 1998, at A1; Cheryl W. Thompson, *Outline for Review of Police Shootings*, Washington Post, Jan. 29, 1999, at B1; and Jo Craven, *Questioning the Cops*, Columbia Journalism Review, March/April 1999, at 26.

[28] Ellen O'Brien & Joanna Massey, *Rape Suspects Record Easily*

(continued...)

the same newspaper used arrest records to demonstrate that, despite the prevailing local belief, blacks were arrested no more frequently than their white neighbors in South Boston.[29]

Other newspapers have investigated whether drunk drivers go unpunished or whether drug lords block urban renewal efforts in an inner-city neighborhood.[30] In short, newspapers, both large and small, use arrest records and other criminal justice records to serve the public interest.

Not only journalists and their readers benefit from public access to arrest records. The California courts have long recognized that it is in the public's interest to identify adults charged with crimes and to put other citizens on notice of those arrests. *Loder v. Municipal Court*, 553 P.2d 624, 628 (Cal. 1976), *cert. denied*, 429 U.S. 1109 (1977). Not only does access encourage transparency in the criminal justice system, it promotes the system's efficiency as well. Publication of arrestee address records can prevent cases of mistaken identity by encouraging those who can provide potential alibis to come forward. Scholars may use the information to map those areas where arrestees live to determine whether there are links between physical location and arrest rates. Through the use of mailing addresses, publishers such as Respondent may provide

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[28](...continued)
Obtainable, Boston Globe, May 12, 1999, at A1.

[29] Indira A.R. Lakshmanan, *Blacks, Whites Arrested at Same Rate in S. Boston*, Boston Globe, Oct. 30, 1994, National/Foreign, at 1.

[30] Jim Haner, *When a Drug Lord is your Landlord*, Baltimore Sun, Feb. 14, 1999, at A1; David Fallis, *Drunk Driving: A Sobering Look*, Tulsa World, Jan. 1999, special reprint; and George Pawlacyzk, *On the Road Again: Illinois' Hidden DUI Deals*, Belleville News-Democrat, April 25-27, 1999 (on file with counsel).

arrested persons with information vital to protecting their rights, including their constitutional right to counsel.

Much will be lost if this Court upholds § 6254(f)(3). The statute favors some categories of requesters and discriminates against others. By focusing on a requester's intended use of the information – for a scholarly, journalistic, political, or governmental purpose, or for investigation purposes by a licensed private investigator – it creates categories of access rights, discriminating between those engaged in speech it approves of and those whose speech it dislikes.

Although the statutory language focuses on the requester's intended *use* of the information, it restricts *speech* based on the way it is packaged and disseminated. *See* footnote 17, *supra*. Petitioner claims that no alternative to § 6254(f)(3) exists and that, if the statute is declared unconstitutional, legislatures will move to block access to all arrest records. However, alternatives to closure do exist.[31] The Legislature could have considered targeting the conduct it disliked, and not the speech leading to it. If the Legislature fears discrimination based on the use of arrest records, it should ban this type of discrimination.[32] California has not chosen to do so. Instead, it banned access to

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[31] Although the Legislature enacted the statute partly out of concern for the expense of providing records, it could have met its goal of conserving funds by following the path chosen by other states which provide for a separate pricing structure, charging commercial requesters a fee reasonably calculated to recoup the additional costs (if any) associated with their requests.

[32] At present, California law prohibits employers from asking job applicants to disclose information about arrests or detentions which did not result in conviction. Employers also are prohibited from using such information with regard to hiring, promotion, termination or participation in apprenticeship programs. Cal. Labor Code § 432.7 (a) (1998).

records by those who would use them for certain disfavored purposes. Upholding § 6254(f)(3) would signal to legislatures across the land that they may restrict access to public records based on a requester's intended use of the information. If this ban is sustained, one is left to wonder what restrictions on access to long-public records will follow.

CONCLUSION

Section 6254(f)(3) of the California Government Code is an aberration. It stands apart from similar state and federal laws and threatens the press' and public's traditional access to arrest records. Its application is unclear and its purported purpose undermined by exceptions. If allowed to stand, the statute will deprive the public of important information by discriminating against requesters whose purpose in seeking access, although legal, is disfavored. The solution to the "problem" perceived here is not to close off access to arrest records. It is to address and regulate the conduct which follows from further dissemination of already public information.

Respectfully submitted,

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July 20, 1999